(1)

e Court, U.S.
L E D

No. 06-697 NOV 15 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEIGHBORHOOD FOOD MART,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY, SECRETARY OF CABINET FOR HEALTH SERVICES,
Respondent.

On Petition for Writ of Certiorari to the Kentucky Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

***Michael A. Schafer**
ATTORNEY AT LAW
440 S. Seventh Street
Suite 200
Louisville, KY 40202

502-584-9511

**Counsel of Record*
Counsel for Petitioner

Nader George Shunnarah
ATTORNEY AT LAW
513 S. Fifth Street
Louisville, KY 40202

502-587-7919

Co-Counsel for Petitioner

November, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

I. Whether KRS 13B.120, which allows the Secretary of the Cabinet for Health Services to reject the findings of fact and conclusions of law of an impartial hearing officer, violates the due process guarantee of the United States and Kentucky Constitutions.

II. Whether the use of a low variance violates KRS 13A.130 as an internal policy and violates the due process and equal protection guarantees of the United States and Kentucky Constitutions.

III. Whether the WIC program rules, regulations, and contract that fail to distinguish intentional and unintentional conduct violate KRS 501.040, Due Process, and Equal Protection.

IV. Whether application of low variance, which is a secret calculation or formula, not defined or explained in any rule, regulation, or statute is statistical profiling in violation of due process and equal protection of the United States and Kentucky Constitutions.

V. Whether the Kentucky Courts erred in upholding the Decision of the Secretary of the Cabinet of Health Services on the ground that the Cabinet never introduced any evidence that disqualification would not result in inadequate participant access as required by 902 KAR 4:040(13) in violation of due process and equal protection.

VI. Whether the Kentucky Courts erred in upholding the decision of the Secretary of the Cabinet for Health Services on the ground that her decision was arbitrary, capricious, lacks support of substantial evidence, and deficient as otherwise provided by law in violation of due process and equal protection.

PARTIES TO PROCEEDING

Neighborhood Food Mart owns and operates a small grocery store in Louisville, Jefferson County, Kentucky and has a license to participate in the program commonly referred to as the WIC program. The WIC program is a federally funded program administered by the Commonwealth of Kentucky that provides an allotment of specified nutritional items for women, infants and children.

The Kentucky Secretary of the Cabinet for Health Services administers the WIC program.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

BASIS OF JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 15

I. The Kentucky Courts and Kentucky Revised Statute KRS 13B.120 allows the Secretary of the Cabinet for Health Services to reject the findings of fact and conclusions of law of an impartial hearing officer and substitute the Cabinet's own decision violates the due process guarantee of the United States and Kentucky Constitutions 15

II. Low variance violates due process, equal protection, and KRS 13A.130 as an internal policy 18

III. No distinction between intentional and unintentional offense violates KRS 501.040, due process and equal protection 22

IV. Low variance is statistical profiling and is a violation of due process and equal protection ... 25

V. The Secretary of the Cabinet and the Kentucky Courts failed to make any finding whether disqualification would result in inadequate participant access in violation of due process and equal protection 26

VI. The decision penalty of the Secretary of the Cabinet that was upheld by the Kentucky Courts was arbitrary, capricious, lacked support of substantial evidence, and deficient as otherwise provided by law 27

CONCLUSION 29

APPENDIX 30

TABLE OF AUTHORITIES

CASES — PAGE

Cabinet for Human Resources v. Kanter,
898 S.W.2d 508 (1995) 22

Clements v. Airport Authority of Washoe County,
69 F.3d 321 (9th Cir. 1995) 18

Com. Ex rel. Meredith v. Frost,
172 S.W.2d 905, 295 Ky. 137 (1943) 21

Exxon Corp. v. Heinze,
32 F.3d 1399, 131 O.G.R.
447 (9th Cir. 1994) 18

Johnson v. Mississippi,
403 U.S. 212, 91 S.Ct. 1778,
29 L. Ed. 2d 423 (1971) 18

Jones v. Cabinet for Human Resources,
Division for Licensure and Regulations,
710 S.W.2d 862 (1986) 16

Kentucky Commission on Human Rights v. Fraser,
Ky., 625 S.W.2d 852 (1981) 16

Marshall v. Jerrico, Inc.,
446 U.S. 238, 100 S.Ct. 1610,
64 L. Ed. 2d 182 (1980) 17

Morrissey v. [illegible]wer,
408 U.S. 471, 92 S.Ct. 2593,
33 L. Ed. 2d 484 (1972) 17-18

Payne v. Lee,
222 Minn. 269, 24 N.W. 2d 259 (1946) 18

Schweiker v. McClure,
456 U.S. 188, 102 S.Ct. 1665,
72 L. Ed. 2d 1 (1982) 16

Wagoner v. Blair Fork Coal Col,
534 S.W.2d 250 (Ky. 1976) 21

FEDERAL STATUTES

28 U.S.C. § 1257(a) 3

KENTUCKY REVISED STATUTES

KRS 13A.130 ..... 12, 18, 20, 27

KRS 13B.120 15

KRS 194.A990 23

KRS 194.990 23

KRS 500.020(1) 24

KRS 501.010 24

KRS 501.040 ..... 23, 27

OTHER AUTHORITIES

902 KAR 4:040(1)(11) 11

902 KAR 4:040(12) ..... passim

902 KAR 4:040(13) 26

Due Process Clause 4, 16-18

Equal Protection Clause 4, 16, 18

U.S. Constitution, 14th Amendment 4

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Supreme Court, Neighborhood Food Mart respectfully prays that a Writ of Certiorari issued to review the decision entered by the Kentucky Court of Appeals and the Denial of Discretionary Review of Kentucky Supreme Court. Neighborhood Food Mart v. Commonwealth of Kentucky, Cabinet For Health Services, 2005-SC-0424-D and 2004-CA-0376.

OPINIONS BELOW

Findings of Fact, Conclusions of Law, and Recommended Decision of the administrative hearing officer dated October 25, 2002. (Recommended Decision, Apx E1-E17).

The Findings of Fact, Conclusions of Law and Final Order of the Kentucky Secretary of the Cabinet for Health Services dated December 26, 2002. (Final Order, Apx D1-D17).

The Kentucky Circuit Court Opinion and Order dated January 28, 2004 affirming the findings of fact and conclusions of law of the Kentucky Secretary of the Cabinet for Health Services. (Circuit Court Opinion and Order, Apx C1-C6).

The Kentucky Court of Appeals Opinion dated April 29, 2005 affirming the Circuit Court decision. (Appellate Court Opinion and Order, Apx B1-B9).

Order denying discretionary review by the Kentucky Supreme Court dated August 17, 2006. (Kentucky Supreme Court Order, Apx A1).

BASIS OF JURISDICTION

The Kentucky Court of Appeals Opinion affirming the Circuit Court decision is dated April 29, 2005. (Appellate Court Opinion and Order, Apx B1-B9). The Order denying discretionary review by the Kentucky Supreme Court is dated August 17, 2006. (Kentucky Supreme Court Order, Apx A1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States read in relevant part, "nor shall any state...deny to any person within its jurisdiction the equal protection of the laws" ... "nor shall any state deprive any person of life, liberty, or property, without due process of law". United States Constitution Amendment XIV.

STATEMENT OF THE CASE

A. BACKGROUND

1. Neighborhood Food Mart (hereafter Neighborhood) owns and operates a small grocery store on Lampton Street, Louisville, Jefferson County, Kentucky. Neighborhood applied for and received a license to participate in the program commonly referred to as the WIC program which is a federally funded program administered by the Commonwealth of Kentucky that provides an allotment of specified nutritional items for women, infants and children. The allotment is redeemable by presenting WIC vouchers or checks to a participating vendor. To be a WIC vendor, a retail or wholesale grocery Store must enter into a Kentucky WIC Program Vendor Agreement ("Agreement"). The Vendors are reimbursed for the cost of the Food items through a centralized WIC bank account. Typically, the Cabinet contracts with stores through local health departments.

2. Neighborhood was charged with violating the WIC program regulation 902 KAR 4:040, Section 12(1)I(i)b, by allegedly charging a participant more for supplemental food than the current shelf price and the Secretary of the Cabinet for Health Services imposed the

ultimate sanction of 3 years suspension from the program pursuant to 902 KAR 4:040, Section 12. The Regulations also impose an additional penalty that in the event a participate suffers the loss of participation in the WIC program, then the store will also loss the ability to accept food stamps, a death knell for any small grocery store in the projects.

3. Pursuant to Federal Regulations, all authorized WIC vendors be monitored at least once every two years. In addition to monitoring vendors, the Cabinet has the ability to conduct "compliance buys", a series of three compliance purchases. A compliance buy is an undercover investigation in which an investigator poses as a WIC participant and makes a purchase using a WIC voucher.

4. In this case a cabinet investigator Rebecca Rose conducted the first compliance buy at Neighborhood. Posing as a WIC participant, she purchased 1 gallon Praire Farms Vitamin D Milk, at a shelf price of $3.49; One gallon Praire Farms 2% Milk, at a shelf price of $3.39; two 46 oz. Libby's Pineapple Juice, no shelf price observed. The Cabinet determined that the store charged $12.96 but the shelf price was $12.26, a 70-cent difference.

5. On January 16, 2002, the investigator returned to the store and purchased 1 gallon of Prairie Farms vitamin D Milk at a shelf price of $3.79 cents; 1 gallon of Prairie Farms 2% Milk at a shelf price of $3.69; one 12 oz. Orchard Gold Apple Juice extra Vitamins C and E., and Zinc, with no shelf price observable. Again, Mr. Ali was the clerk, and he asked the investigator to sign the voucher before the pay exactly amount was entered. The Cabinet found no violation in shelf price charges, but the voucher did reveal the purchase of an unauthorized food item (orange juice) and the failure to enter the pay exactly amount.

6. On January 22, 2002, the investigator returned for a third time purchasing 1 gallon Prairie Farms vitamin D. Milk at a shelf price of $3.79; one gallon of Prairie Farms 2% Milk at a shelf price of $3.69; one 12 oz. Orchard Gold Apple Juice, no price listed; one 12 oz. Minute Maid Orange Tangerine Juice with Calcium, no price listed; one 24 oz. Kellogg's Corn Flakes at a shelf price of $4.29; one 12 oz. General Mills Corn Chex at a shelf price of $3.99; and 1 dozen Rose Acre Farm Grade A Jumbo Eggs, with no shelf price observed. Again Mr. Ali was the clerk and he failed to enter the pay exactly amount

at the time of the purchase. The Cabinet found a violation in that the pay exactly amount using the shelf and list prices at $20.73 but the voucher was redeemed by Neighborhood for $24.12.

7. The Cabinet notified the store of the violations and imposed a 3 year disqualification from the WIC program for two (2) of three (3) positive compliance buys while exhibiting a pattern of low variance in at lease two (2) out of four (4) quarters in the prior federal fiscal year.

8. The Cabinet claims Neighborhood had a low variance and gave the Neighborhood notice thereof in a letter dated December 21, 2001. The letter notified Neighborhood that it had a pattern of low variance in 3 of the last 4 federal fiscal year quarters. The letter indicated that such a pattern could lead to a disqualification from the program if combined with 2 of 3 positive compliance buys. The letter also stated that low variance "may not indicate that there is anything wrong" with the store's redemption patterns. The letter reported that the Cabinet considers variance to be low if the ratio is 0.3000 or below. The Cabinet notified the store that its variance were as follows:

1st quarter	0.0038
2nd quarter	n/a
3rd quarter	0.0256
4th quarter	0.0847

9. The Cabinet uses the variance to identify "high risk" vendors, and explained that a low variance occurs when a store's redemption of similar food-program vouchers is showing at or close to the same amount. According to the Cabinet, high risk vendors are more likely to have fraudulent submissions.

10. The WIC vendor contract states that there shall be no differentiation between intentional and unintentional overcharges when determining sanctions.

11. The store timely requested an administrative hearing before an administrative hearing officer. Under the current regulations, the hearing officer shall make recommended finding but the Secretary of the Cabinet has final review authority. A hearing was held.

12. The store stipulated to the violations but offered an explanation that the regular cashier was out of the store due to family health problems with their daughter. The hearing officer found that Mrs. Salwa Ali was the regular cashier and Mr. Yousef Ali was the butcher. Mr. Yousef Ali has limited education and cannot read English.

Mrs. Ali was not at the store during the time due to a very serious family medical emergency. Mr. Ali had not received any WIC training. The Ali's testimony was that the overcharges were not intentional but were due to the confusion of Mr. Ali.

13. The hearing officer found that the Cabinet's witnesses "did not explain how the 0.30 ratio was determined or what exactly the ratio was comprised of, saying only that low variance occurs when a store redemption patterns of similar vouchers are close to the same amount". The hearing officer also found that "low variance can be explained not as fraud, but as occurring in small store that do not have a wide variety of food and prices". The officer also found that "the trigger level of variance violation, 0.300, was not contained in the Cabinet's regulation". The hearing officer found that "under the terms of the WIC vendor agreement, the Cabinet does not differentiate between intentional and unintentional overcharges when determining sanctions". The hearing officer also found that "the overcharges were an unintentional incident stemming from confusion by Mr. Ali, and not an attempt to intentionally defraud the WIC program".

14. The hearing officer also made conclusions of law that are relevant to this appeal. He ruled that to establish a violation, "the Cabinet must show 2 of 3 positive compliance buys and low variance for 2 of 4 federal quarters". He found that low variance is defined as "the redemption of the same type of food instruments at the same price or within a narrow price range" 902 KAR 4:040(1)(11). The hearing officer found that low variance is an element or a condition precedent to the violations leading to the sanction applied in this case, the Cabinet must meet its burden of proof to establish that the vendor had low variance, and that such condition violates the regulation. The hearing officer ruled that the Cabinet failed to meet that burden.

15. The hearing officer concluded that:

> ...the Cabinet had the burden to establish a violation of the regulation. In this matter, the Cabinet did establish what the variance level was for this Vendor. But the Cabinet must also show that such a level violates a validly promulgated regulation. The Cabinet testified that the variance level threshold that constitutes low variance is 0.30 or below. While this testimony shows the level considered by the Cabinet to constitute low variance, it does not show that the levels were in violation of a

regulation. Simply because the Cabinet considers a ratio below 0.30 to be low variance, that does no make it so, absent a valid regulation. At best, the Cabinet can prove that Neighborhood's variance levels violated an internal policy on acceptable variance levels. As a matter of law, internal policy cannot be enforced as a regulation. KRS 13A.130. In short, the Cabinet did not show that Neighborhood's variance rations of .0038 (1st Quarter), 0.0256 (3rd Quarter), and 0.0847 (4th Quarter) violate any provision contained in the regulation. Absent such proof, the violation of 902 KAR 4:040 Section 12(1)(i) cannot be sustained.

13. Due process must be afforded at any level of legal proceeding whether in Circuit Court, Appeals Court, or the administrative process. At the heart of due process is the requirement that the regulated public be made aware of what actions place them in danger of being sanctioned. In this matter, the Cabinet's regulations does not alert the public as to what level of variance is a violation, even though its letters may. No amount of constructive notice; i.e., letters and seminars, can overcome the constitutionally protected right of due process via regulatory notification of the standard of the law. This is compounded by the Cabinet's statement on its low variance letter that this "may not indicate that anything is wrong". While this decision is

not based on a finding of a KRS Chapter 13A violation, the Cabinet would be wise to consider both the implication of this ruling, and how a reviewing court would look at this matter.

16. The Secretary of the Cabinet rejected the recommendations of the impartial hearing officer and ruled that Neighborhood stipulated the violations of the improper transactions and a having a low variance, that the hearing officer's conclusion that due process of law requires that the Cabinet must include in its regulation more definition, detail and explanation of the concept "low variance", and the specifics of the calculation by mathematical formulae for determining whether a vendor meets the threshold ratio to exhibit "low variance", was incorrect, and reversed the decision of the hearing officer and imposed a 3 year disqualification as a sanction for an alleged violation of overcharges under $10.00 dollars.

Neighborhood appealed the decision of the Secretary to the Jefferson Circuit Court. The Circuit Court only ruled upon the issue whether the decision of the Secretary was supported by substantial evidence. The Circuit Court failed to rule upon any other issue on appeal. A notice of appeal of the Circuit Court's decision was filed

on February 20, 2004. The Kentucky Court of Appeals affirmed the Circuit Court decision on April 29, 2005. (Appellate Court Opinion and Order, Apx B1-B9). The Order denying discretionary review by the Kentucky Supreme Court was dated August 17, 2006. (Kentucky Supreme Court Order, Apx A1).

ARGUMENTS SUPPORTING ALLOWANCE OF THE WRIT

I. VIOLATION OF DUE PROCESS

The Kentucky Courts and Kentucky Revised Statute KRS 13B.120 allow the Secretary of the Cabinet for Health Services to reject the findings of fact and conclusions of law of an impartial hearing officer and substitute the Cabinet's own decision violates the due process guarantee of the United States and Kentucky Constitutions.

By granting Certiorari of this Petition, the Supreme Court of the United States will give guidance, clarification and rule of law as to whether or not the Kentucky Court opinions and Kentucky Statute KRS 13B.120 are consistent with current opinions of the Supreme Court of the United States.

This case is somewhat unusual in that an impartial administrative hearing officer who found in favor of Neighborhood conducted the initial hearing. Subsequently, the Secretary of the Cabinet entered her own findings of facts and conclusions of law contrary to those found by the hearing officer. The entire process that allows the Secretary of the Cabinet, pursuant to KRS 13B.120, who has the duty to enforce the statutes, that enacts the

rules and regulations, that investigates violations, presents evidence of violations, and enforces sanctions for violations, to sidestep the findings of fact and conclusions of law of an impartial administrative hearing officer violates the due process clause and equal protection guarantees of the Constitution of the United States and the Commonwealth of Kentucky.

The Court in Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852 (1981), held that "a hearing before an administrative agency that has investigative, prosecutorial and adjudicative functions is not violative of due process". In Fraser, supra, an ABC hearing officer made the findings of fact, conclusions of law, and imposed an award. The head of the Commission did not rewrite the facts, and change the conclusions of law. In Jones v. Cabinet for Human Resources, Division for Licensure and Regulations, 710 S.W.2d 862 (1986), the court quotes Fraser, but again, a hearing was held with a impartial hearing officer and the Secretary of the Cabinet did not rewrite the facts and change the conclusions of law.

Due process requires that the tribunal be a fair and impartial one. Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed. 2d 1 (1982). The Supreme Court of

the United States, in Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980), stated that:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisions making process... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done", ...by ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him... We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, "justice must satisfy the appearance of justice..."

For example a probation officer may not make the determination whether reasonable grounds exist for the revocation of a parole. Morrissey v. Brewer, 408 U.S. 471,

485-486, 92 S.Ct. 2593, 2602-2603, 33 L. Ed. 2d 484 (1972). A trial before an unbiased judge is essential to due process. Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L. Ed. 2d 423, (1971). The Due Process Clause is concerned not only with the actual bias of judges and jurors, but also with the need for the appearance of justice. Exxon Corp. v. Heinze, 32 F.3d 1399, 131 O.G.R. 447 (9th Cir. 1994). An adjudication that is tainted by bias cannot be constitutionally redeemed by a review in an unbiased tribunal. Thus, subsequent state court procedures, even if they include a de novo review, cannot "cure" bias in the initial adjudication. Clements v. Airport Authority of Washoe County, 69 F.3d 321 (9th Cir. 1995). A statute that compels a litigant to submit his or her controversy to a tribunal of which his or her adversary is a member does not afford due process of law. Payne v. Lee, 222 Minn. 269, 24 N.W. 2d 259 (1946).

II. LOW VARIANCE VIOLATES DUE PROCESS, EQUAL PROTECTION AND KRS 13A.130 AS AN INTERNAL POLICY.

The low variance used by the Cabinet is an internal policy of the Cabinet and is prohibited by KRS 13A.130. KRS 13A.130 specifically states that:

(1) An administrative body shall not by internal policy, memorandum, or other form of action:

> (a) Modify a statute or administrative regulation;
>
> (b) Expand upon or limit a statute or administrative regulation; and
>
> (c) Except as authorized by the Constitution of the United States, the Constitution of Kentucky, or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation.

(2) Any administrative body memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void and unenforceable.

(3) This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision that is authorized by statute.

Neighborhood agrees with the finding of the hearing officer that:

> ...the Cabinet had the burden to establish a violation of the regulation. In this matter, the Cabinet did establish what

> the variance level was for this Vendor. But the Cabinet must also show that such a level violates a validly promulgated regulation. The Cabinet testified that the variance level threshold that constitutes low variance is 0.30 or below. While this testimony shows the level considered by the Cabinet to constitute low variance, it does not show that the levels were in violation of a regulation. Simply because the Cabinet considers a ratio below 0.30 to be low variance, that does no make it so, absent a valid regulation. At best, the Cabinet can prove that Neighborhood's variance levels violated an internal policy on acceptable variance levels. As a matter of law, internal policy cannot be enforced as a regulation. KRS 13A.130. In short, the Cabinet did not show that Neighborhood's variance rations of .0038 (1st Quarter), 0.0256 (3rd Quarter), and 0.0847 (4th Quarter) violate any provision contained in the regulation. Absent such proof, the violation of 902 KAR 4:040 Section 12(1)(i) cannot be sustained.

The Secretary for the Cabinet held that "there are constitutional reasons why the makeup and strategy comprising the "High Risk" category should not be disclosed to vendors" and those ground are that such disclosure would "compromise State agency investigative

techniques". The Secretary also stated "low variance is not a violation". (Final Order, ¶17, Apx D16).

If having a low variance violates no statute, regulation, or rule, and furthermore, is not a violation then it may not be used to enhance a penalty resulting in the suspension of the WIC license that would also result in the suspension of the Federal Food Stamp license, which would also result in the closure of the business. The evidence shows that small stores will typically have a low variance due to less of a variety of products and therefore the low variance enhancement of penalty treats businesses differently and this is what violates due process and equal protection. Furthermore, Kentucky courts have also stated that:

> Administrative boards must execute law committed to them fairly and honestly and treat everyone alike according to standards and rules of action prescribed; where if there is failure in this respect and it extends beyond rudimentary requirements of fail play, it enters realm of unreasonable and arbitrary action from which courts will save citizen affected by it. Wagoner v. Blair Fork Coal Col, 534 S.W.2d 250 (Ky. 1976) and Com. Ex rel. Meredith v. Frost, 172 S.W.2d 905, 295 Ky. 137 (1943).

III. NO DISTINCHTION BETWEEN INTENTIONAL AND UNINTENTIONAL OFFENSE VIOLATES KRS 501.040, DUE PROCESS AND EQUAL PROTECTION.

The Secretary's finding that there is no differentiation between intentional and unintentional overcharges when determining sanctions (Final Order, ¶18, Apx D9-D10) is in error. Furthermore, the WIC contract provision that provides that any violation whether intentional or unintentional is against public policy and violates KRS 501.040, due process and equal protection guarantees of the Constitutions of the United States and the Commonwealth of Kentucky. Appellant is sure the Secretary is relying upon Cabinet for Human Resources v. Kanter, 898 S.W.2d 508 (1995), another WIC violation case, in which the court held that "whether overcharges are intentional or unintentional is irrelevant for the purposes of imposing the sanctions at issue". In that case, the court found that:

> 1. The vendor contract specifically state distinction will be made for purpose of imposing sanctions for certain violations;
>
> 2. All vendors received extensive training in program procedure and both vendors in that case received training in all areas of

> program procedures including violations of the Program and applicable sanctions; and
>
> 3. The regulations applied to equally to everyone within the class and neither vendor argues he or she was treated differently.

What the Secretary overlooked is that 902 KAR 4:040 Section 12 is a criminal offense with penalties outlined in KRS 194.A990. In pertinent part, 902 KAR 4:040 Section 12(1) states "In addition to any criminal penalty imposed pursuant to KRS 194.990, the cabinet shall impose one (1) or more of the following civil sanctions for designated violations committed by a vendor, her employee or agent..." Since 902 KAR 4:040 Section 12 is a criminal offense with mandatory civil penalties and it fails to designate a culpable mental state, then KRS 501.040 applies. KRS 501.040 states that:

> Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state.

In pertinent part, KRS 501.010 states "Culpable mental state" means "intentionally" or "knowingly" or "wantonly" or recklessly..." KRS 500.020(1) states "Common Law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state. Obviously, 902 KAR 4:040 Section 12(1)(i)(b) necessarily involves the culpable mental state of intent. Therefore, the Secretary cannot ignore the statutory requirements of culpable mental state, and any provision in any WIC contract that states intent is irrelevant is against public policy, statutory authority, due process and equal protection.

Furthermore, in this case, the alleged violator had no training and is being treated differently on the ground that Neighborhood Food Mart is receiving a substantially greater penalty due to having a low variance that the Cabinet has failed to provide any notice of calculation or method of arriving at said low variance.

Furthermore, since 902 KAR 4:040 Section 12 is criminal in nature, the Cabinet must prove guilt beyond a reasonable doubt, must insure the alleged violator is given notice of his constitutional rights under Miranda and is

entitled to a jury of his or her peers. None of the above constitutional protections were afforded Neighborhood.

IV. LOW VARIANCE IS STATISTICAL PROFILING.

The Secretary stated that Low Variance is not a crime, not improper or illegal. Low Variance is not defined or explained in any rule, regulation, or statute. According to the Secretary, the definition, calculation or formula regarding low variance is allegedly kept secret for the purposes of investigative integrity. Due Process and Equal protection do not allow for any punishment, fine or any enhancement thereof when the standard being applied is calculated in secret, kept secret, no notice thereof is given. How is Neighborhood able to challenge the elements of the charge without any elements or calculation being provided? Low Variance is statistical profiling that discriminates against small stores with fewer products and therefore, violates due process and equal protection guarantees of the Constitutions of the United States and the Commonwealth of Kentucky. A large store, with a greater quantity and variety of products would have a high variance and would not suffer an enhanced penalty with a similar violation.

V. SECRETARY FAILED TO FIND IF DISQUALIFICATION WOULD RESULT IN INADEQUATE PARTICIPANT ACCESS.

Prior to disqualifying a vendor for a violation pursuant to 902 KAR 4:040(12), there must be a finding if disqualification of the vendor will result in inadequate participant access. In other words will persons on the WIC program be able to go to another WIC vendor to purchase approved products. In pertinent part, 902 KAR 4:040(13) states... 'prior to disqualifying a vendor for a violation specified in Section 12 of this administrative regulation, the WIC Program vendor manager shall determine if disqualification of the vendor will result in inadequate participant access'. Furthermore, the criteria used to determine adequate participant access is described in 902 KAR 4:040(13) 2 through 5. The Finding of Fact, Conclusions of Law and Final Order clearly omit any findings or conclusions of any adequacy of participant access in the event Neighborhood is disqualified. Therefore, the decision of the Secretary should be set aside and this action dismissed with prejudice.

VI. DECISION AND PENALTY OF THE SECRETARY IS ARBITRARY, CAPRICIOUS, LACKS SUPPORT OF SUBSTANTIAL EVIDENCE, AND DEFICIENT AS OTHERWISE PROVIDED BY LAW.

Imposition of a three-year disqualification for an unintentional error in amount under $10.00 dollars is unwarranted, arbitrary, capricious, and lacks total discretion. If one takes into account all of the facts and circumstances of this case, specifically:

1. The Secretary's reversal of an independent hearing officer's decision;

2. The use by the Secretary of low variance a secret internal policy to enhance a first time violation to a three year suspension resulting in the loss of the WIC license and the Food Stamp License which would in effect put Neighborhood Food Mart out of business;

3. That use of internal policies are prohibited by KRS 13A.130;

4. That no distinction is made between intentional and unintentional offense in violation of KRS 501.040;

5. The Secretary's use of low variance is statistical profiling of small neighborhood grocery stores

for the purpose of enhancing penalties and treats small versus large store differently for similar violations;

6. The Secretary's incorrect findings of facts of stipulation of low variance which counsel for Appellant specifically excepted from the stipulations;

7. The Secretary's failure to follow her own regulations in that require the Cabinet to use designated criteria to determine if disqualification would result in inadequate participant access and failure of the Secretary to make any findings at all regarding access.

All of the above lead to the conclusion that the findings of fact, conclusions of law, and decision of the Secretary and the decisions of the Kentucky Courts lack support of substantial evidence on the whole record; that the findings of fact, conclusions of law and decision of the Secretary are arbitrary, capricious, and are an abuse of discretion; and the findings of fact, conclusions of law and decision of the Secretary are deficient as otherwise provided by law. For all the foregoing reasons, Neighborhood respectfully requests this court to set aside and vacate the decisions of the Kentucky Courts and the order of the Secretary.

CONCLUSION

For all the above reasons, Neighborhood respectfully requests this court reverse the decisions of the Kentucky Courts and reverse the Findings of Fact, Conclusions of law, and Final Order of the Secretary of the Cabinet, and uphold the Findings of Fact, Conclusions of Law, and Order of the administrative hearing officer.

Respectfully submitted,

MICHAEL A. SCHAFER
Counsel of Record for Petitioner
Neighborhood Food Mart
440 South Seventh Street
Suite 200
Louisville, KY 40202
Telephone (502) 584-9511

Nader G. Shunnarah
Co-Counsel for Petitioner
Neighborhood Food Mart
513 South Fifth Street
Louisville, KY 40202
Telephone (502) 587-7919
Facsimile (502) 479-9688

APPENDIX

KENTUCKY SUPREME COURT:

Order Denying Discretionary Review,
filed 08/17/06 ..... A1 - A1

KENTUCKY COURT OF APPEALS:

Opinion and Order,
filed 04/29/05 ..... B1 - B9

JEFFERSON CIRCUIT COURT:

Opinion and Order,
filed 01/28/04 ..... C1 - C6

CABINET FOR HEALTH SERVICES:

Findings of Fact, Conclusions
of Law, and Final Order,
filed 12/26/02 ..... D1 - D17

Findings of Fact, Conclusions of
Law, and Recommended Decision,
filed 10/25/02 ..... E1 - E17

SUPREME COURT OF KENTUCKY
2005-SC-0424-D
(2004-CA-0376)

NEIGHBORHOOD FOOD MART *Movant*

v. **JEFFERSON CIRCUIT COURT**
NO. 2003-CI-0797

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES *Respondent*

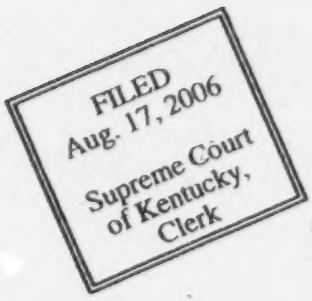
ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Minton, J., not sitting.

ENTERED August 17, 2006.

/s/ Joseph E. Lambert
Chief Justice



RENDERED: APRIL 29, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 2004-CA-000376-MR

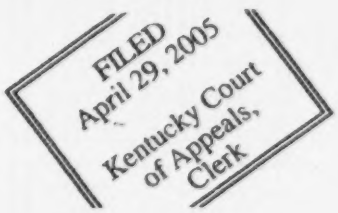
APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 03-CI-000797

NEIGHBORHOOD FOOD MART – ***Appellant***

v.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES ***Appellee***

OPINION
AFFIRMING



** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1] GUIDUGLI, JUDGE: Neighborhood Food Mart appeals from an opinion and

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

order of the Jefferson Circuit Court affirming the findings of fact, conclusions of law, and final order of the Secretary of the Cabinet for Health Services. The Secretary rejected a hearing officer's recommended decision, and ruled that Neighborhood should be suspended for three years from participation in the WIC program. The suspension was based on the allegation that Neighborhood charged a WIC participant more for food than the current shelf price in violation of 902 KAR 4:040 § 12(1)(i)1.b. For the reasons stated below, we affirm.

Neighborhood is a small grocery store located in Jefferson County, Kentucky. Neighborhood participates in the federally funded WIC program, which is a supplemental nutritional program for women, infants and children. Under the terms of the program, Neighborhood may accept WIC "food instruments", i.e, vouchers, from WIC participants, parents or caretakers in exchange for specified food items. Neighborhood is reimbursed by the WIC program from a centralized WIC bank account for the cost of the food items. As a food vendor in the WIC program, Neighborhood agreed to abide by the relevant state and federal regulations governing the operation of the program.

In January 2002, a Cabinet for Health Services investigator posing as a WIC customer made food purchases at Neighborhood using WIC vouchers. Over the course of three visits, the investigator purchased WIC-authorized food items including milk, breakfast cereal and eggs. The investigator determined that on two of the three visits, Neighborhood charged more for certain food items than the listed shelf price in violation of WIC regulations, and that it made the sale of an unauthorized food item.

On April 23, 2002, the Cabinet notified Neighborhood by letter of its findings and imposed a three-year disqualification from the WIC program. The disqualification was based in part on the Cabinet's December 21, 2001, finding of a pattern of "low variance" in three of the last four federal fiscal year quarters.[2] In the December 21, 2001, letter to Neighborhood, the Cabinet warned that the low variance coupled with any future

[2] Low variance is defined as "the redemption of the same type of food instruments at the same price or within a narrow price range". 902 KAR 4:040 § 1(13). It is a measure of the degree to which a store's redemption amount of similar food program vouchers varies. According to the Cabinet, low variance vendors are more likely to have fraudulent submissions.

violations could result in disqualification from the WIC program.

Neighborhood requested and received a hearing before an administrative hearing officer. It stipulated to the violations, but argued that they were inadvertent. It claimed that the co-owner and cashier, Salwa Ali, was not present because of a family medical emergency, and that the store's butcher, Yousef Ali (also a co-owner), was operating the cash register when the investigator made the purchases. Neighborhood claimed that Mr. Ali could not read English and had not received any WIC training. In sum, Neighborhood contended that the overcharges were not intentional and that it did not knowingly violate the applicable WIC regulations.

After considering the arguments, the hearing officer rendered his findings of fact, conclusions of law, and recommended decision in favor of Neighborhood. It noted that while the Cabinet had a policy that a variance below 0.30 was "low", this policy did not have the force of a regulation and could not be relied upon as a basis for suspending Neighborhood from the WIC program. Based on the Cabinet's failure to establish that Neighborhood's variance levels violated a provision of the WIC regulation,

the hearing officer recommended that Neighborhood's three-year disqualification be reversed.

The matter went before the Secretary of the Cabinet, who rejected the hearing officer's recommended decision. By way of findings of fact, conclusions of law, and final order rendered on December 26, 2002, the Secretary concluded that the Cabinet met its burden of proving violations on two of the three compliance buys, that low variance was shown, and that the sanction imposed was in accordance with 902 KAR 4:040 § 12.

Neighborhood appealed to the Jefferson Circuit Court. In affirming the Secretary's ruling, the circuit court determined that the Cabinet's decision was supported by substantial evidence. This appeal followed.

Neighborhood now argues that the circuit court erred in affirming the Cabinet's ruling. It maintains that it failed to receive due process of law before the Secretary; that the use of a low variance violates the due process and equal protection guarantees of the United States and Kentucky Constitutions; that the WIC regulations improperly fail to distinguish between intentional and unintentional conduct; that the application of a low variance is "statistical profiling"; that the circuit court erred

in finding that the Cabinet's decision was supported by substantial evidence; and that the Cabinet's failure to properly file its charges against Neighborhood Food Mart, Inc., should result in a reversal of the circuit court's ruling. In sum, it maintains that the circuit court's ruling was erroneous and it seeks an order reversing the circuit court's ruling and reinstating the hearing officer's decision.

We have closely examined the record and the law, and find no error. 902 KAR 4:040 § 12(1)(i)2.a states that, "[T]wo (2) positive compliance buys out of three (3) shall result in a three (3) year disqualification if: ...(ii) The vendor has exhibited a pattern of two (2) out of four (4) quarters of low variance in the prior federal fiscal year". Neighborhood has stipulated to two positive compliance buys. The dispositive question, then, is whether Neighborhood exhibited a pattern of low variance in at least two out of four quarters, and whether the Cabinet properly applied these facts to the law in determining that a three year suspension was warranted.

The record indicates that the Cabinet's policy is to adjudge a variance below 0.30 to be "low" for purposes of 902 KAR 4:040 § 12(1)(i)2.a. While Neighborhood correctly notes that this 0.30 standard is not found in the

regulatory language, it is a fixed standard which is applied equally to all WIC participants and does constitute a reasonable basis for determining what constitutes a "low" variance. Under this standard, Neighborhood's variance ratios of 0.0038, 0.0256 and 0.0847 are "low" for purposes of 902 KAR 4:040 § 12(1)(i)2.a., and the Secretary properly so found.

In reviewing an agency decision, a court may overturn that decision only if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record.[3] The court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim.[4] In the matter at bar, the circuit court properly determined that the Cabinet acted within the scope of its authority, that it applied the correct rule of law, and that its findings were supported by substantial evidence. Accordingly, we find no error on this issue.

---

[3] Lindall v. Commonwealth Retirement Systems, 112 S.W.3d 391 (Ky.App. 2003), citing Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972).

[4] Id., citing Kentucky Unemployment Ins. Comm'n v. King, 657 S.W.2d 250 (Ky. App. 1983).

Neighborhood's remaining arguments were not addressed by the Cabinet or the circuit court, which prevents us from addressing them.[5] "CR 52.04 requires a motion for additional findings of fact when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal".[6] We are constrained to address only those claims of error which have been adjudicated by a lower court or tribunal. That is to say, we may examine alleged errors of law but may not undertake a *de novo* review of matters not previously addressed.[7] Since Neighborhood's remaining arguments were not addressed by the Cabinet or the circuit court, there is nothing for us to review on these issues.

For the foregoing reasons, we affirm the Opinion and Order Affirming Judgment of the Jefferson Circuit Court.

ALL CONCUR.

---

[5] Monin v. Monin, 156 S.W.3d 309 (Ky.App. 2004).
[6] Eiland v. Ferrell, 937 S.W.2d 713 (Ky. 1997).
[7] Kentucky Constitution § 115; Smith v. Riherd, 603 S.W.2d 494 (Ky.App. 1980).

BRIEF FOR APPELLANT:

Nader G. Shunnarah
Louisville, KY

BRIEF FOR APPELLEE:

Graddy W. Johnson
Commonwealth of Kentucky
Cabinet for Health and Family Services
Frankfort, KY

CASE NO. 03-CI-0797 JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN (13)

NEIGHBORHOOD FOOD MART *Appellant*

VS. **OPINION AND ORDER AFFIRMING JUDGMENT**

FILED
Jan. 28, 2004
Jefferson Circuit Court, Clerk

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH SERVICES *Appellee*

****

This matter comes before the Court on the Appellant Neighborhood Food Mart's ("Appellant") petition for review of Findings of Fact, Conclusions of Law and Final Order dated December 26, 2002, by the Secretary, Cabinet for Health Services ("Appellee"). After studying the record and applicable case and statutory law of the Commonwealth, the Court shall affirm the Appellee's judgment.

OPINION

The Appellant offers various food items to members of the WIC program, a federally funded program providing an allotment of specified nutritional items for women, infants or children. The Commonwealth of Kentucky

administers and regulates the program and has a federal mandate to monitor all WIC vendors at least once every two years. The Appellee has at its disposal the ability to conduct three "compliance buys", which this Court understands to be a series of test runs to determine whether a vendor is complying with the guidelines of the WIC program. In this case, three separate compliance buys were conducted over a period of at least several weeks in or about January, 2002. The Appellee's buyer found that the Appellant overcharged WIC in two instances (once for .70, once for $3.39), along with allowing an unauthorized purchase (orange juice) and failing to enter the pay exact amount in the third instance. The overcharge amount, excluding the orange juice, was a whopping four dollars and nineteen cents.

The Appellee sent a letter to the Appellant on December 21, 2001, stating that it had "low variance" in three of the last four fiscal year quarters. The letter indicated that such a pattern could lead to a disqualification from the program if combined with two or three positive compliance buys. Needless to say, after the three compliance buys were conducted, the Appellee imposed the ultimate sanction of three years' suspension from the WIC

program, a sanction which leads to a further punishment for the Appellant--losing the ability to accept food stamps. The Appellant timely moved to have its case heard by an independent hearing officer and attempted to explain that the overcharges, etc., were unintentional and caused by a clerk unfamiliar with the WIC system. However, according to the program's regulations, whether an overcharge is intentional or not is immaterial. Nevertheless, the hearing officer found for the Appellant, stating that the Appellee failed to show that the low variance level, 0.30, violated a validly promulgated regulation. This decision was overturned by the Secretary of the Cabinet, which ruled that the Appellant stipulated the violations of the improper transactions and had a low variance level, and that the hearing officer's discourse on the need of the Appellee to delineate and explain its low variance concept in the regulations was incorrect. This appeal followed.

In reviewing an agency decision, a court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record. Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391, 394 (Ky.

App., 2003). As the Kentucky Supreme Court recently stated:

> 'If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found'. Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n, Ky., 437 S.W.2d 775, 778 (1969). The administrative agency's findings will be upheld even though there exists evidence to the contrary in the record. Kentucky Comm'n on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Substantial evidence is defined as 'evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons]'. Owens-Coming Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998). We must also determine whether the decision of the administrative agency was arbitrary or clearly erroneous, which is defined as 'unsupported by substantial evidence'. Danville-Boyle County Planning and Zoning Comm'n v. Prall, Ky., 840 S.W2d 205, 208 (1992). 'If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained'. Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970). *See* Kentucky Unemployment Ins.

Com'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 578-79 (Ky., 2002).

It is with regret that this Court must affirm the final judgment tendered against Appellant by the Appellee. To say that this Court is dissatisfied with the Appellee's cursory dismissal of its independent officer's conclusion of law as to the problems with the variance level assessment ("The Hearing Officer's conclusion that *due process of law* requires that the Cabinet must include in its regulation more definition, detail and explanation of the concept 'low variance', and the specifics of the calculations by mathematical formulae for determining whether a vendor meets the threshold ratio to exhibit 'low variance', is incorrect") would be a great understatement. Notwithstanding this Court's displeasure with such, the Appellee's judgment, the Court finds, is supported by substantial evidence and is not arbitrary or capricious, in light of the stipulated overcharges (infinitesimal as they might be) and low variance levels. Further, the Appellee applied the correct rule of law to the facts of this matter. The Court is of a mind to remind the Appellant that this Court is bound by law to affirm the Appellee; it is up to the Appellant and those in its position to call the Kentucky

Legislature's attention to this issue if changes are ever to be made.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Final Judgment issued by the Appellee be and hereby is **AFFIRMED.**

/s/ Geoffrey P. Morris
GEOFFREY P. MORRIS, JUDGE
JEFFERSON CIRCUIT COURT

ENTERED IN COURT

JAN 28, 2004

TONY MILLER, Clerk

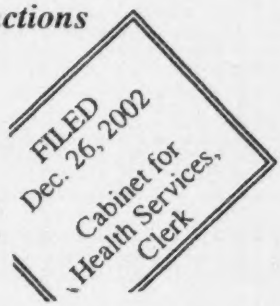
By: /s/ Tony Miller
Deputy Clerk

cc:
Nadar D. Shunnarah, Esq.
513 South Fifth Street
Louisville, KY 40202

Graddy Johnson, Esq.
Cabinet for Health Services
275 East Main Street, 5W-B
Frankfort, KY 40621-0001

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH SERVICES
Administrative Hearings Branch
Case No. AHB DMS 02-226

IN RE: **NEIGHBORHOOD FOOD MART**
Appeal of WIC Program Sanctions
Vendor # 156801



FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

*** *** *** *** *** ***

This matter is before the Secretary of the Cabinet for Health Services pursuant to KRS 13B.120. Having reviews the record, including the Findings of Fact, Conclusions of Law and Recommended Order issued by the Hearing Officer on October 25, 2002, the Exceptions to the Recommended Order duly filed by the Cabinet and the Reply to the Cabinet's Exceptions filed by the Appellant, I reject and modify the Recommended Order and affirm the Cabinet sanctions imposed on the Appellant. I do hereby issue Findings of Fact, Conclusions of Law and Final Order in support of the rejection, as follows:

The issues to be determined in the matter are: whether the Appellant violated WIC Program regulation

902 KAR 4:040, Section 12(1)(i)b, by charging a participant more for supplemental food than the current shelf price and whether the sanction imposed is in accordance with 902 KAR 4:040, Section 12.

FINDINGS OF FACT

At the hearing, the parties agreed to stipulate to the violations as alleged by the Cabinet. Therefore, the facts in this matter are not in dispute and were presented as uncontested.

1. The Kentucky WIC program is a federally funded program administered by the state that provides an allotment of specified nutritional items for women, infants and children. This allotment is redeemable by presenting WIC vouchers or checks to a participating vendor. To be a WIC vendor, a retail or wholesale grocery store must enter into a Kentucky WIC Program Vendor Agreement ("Agreement"). The vendors are reimbursed for the cost of the food items through a centralized WIC bank account. Agreements are renewed on an annual basis if a vendor continues to meet WIC Program criteria. Typically, the Cabinet contracts with stores through local health departments. *Testimony of Ruthanne Boyles.*

2. Neighborhood, Food Mart ("Neighborhood") renewed its Vendor Agreement with the Jefferson County Health Department on December 1, 2001. Salwa Ali, a co-owner of Neighborhood, signed the Agreement on behalf of the Vendor. The Agreement includes Attachments A and D. Paragraph 1(a) of the Agreement obligates the vendor to comply with applicable Federal and State policies, procedures, and regulations relating to the WIC Program. WIC vendors and their employees are charged with the knowledge of all policies and procedures of the WIC Program. WIC vendors are accountable for the actions of their employees in the utilization of food instruments or in the provision of supplemental foods. *Testimony of Ms. Boyles*; *Cabinet Exhibit 7*.

3. Pursuant to the Agreement, Neighborhood agrees to charge "the First Party (WIC Program) the current retail market price or less. In no event shall food costs charged exceed the shelf price of the food provided. The shelf price is considered the current retail market price". *Cabinet Exhibit 7*. "Shelf price" is defined in 902 KAR 4:040, Section 1(16) as the "price displayed on the vendor's display case, on the shelf, or on the food item". According to Ms. Boyles, the shelf price is the price that should

always be charged to the WIC Program. *Testimony of Ms. Boyles.*

4. During January, 2002, Yousef and Salwa Ali were the owners of Neighborhood, located in Louisville, Kentucky and participating in the WIC program as Vendor # 156801. *Testimony of Ms. Boyles*; *the parties' Vendor Agreement.*

5. Federal regulations mandate that all authorized WIC vendors be monitored at least once every two years. In addition to monitoring vendors, the Cabinet has the ability to conduct "compliance buys", a series of three compliance purchases. A compliance buy is an undercover investigation in which an investigator poses as a WIC participant and makes a purchase using a WIC voucher. The investigator then completes a written report that is submitted to the WIC Vendor Management Unit. After the voucher has cleared the bank, the WIC Vendor Management Unit compares the written report and the voucher to determine whether any WIC Program violations occurred during the compliance buy. *Testimony of Ms. Boyles*; *Testimony of Rebecca Rose.*

6. On January 10, 2002, Cabinet Investigator Rebecca Rose conducted the first compliance buy at

Neighborhood. Ms. Rose, posing as a WIC participant, purchased food items using WIC voucher instrument number 0144615. With that instrument, Ms. Rose purchased the following: 1 gallon Prairie Farms Vitamin D Milk, at a shelf price of $3.49; 1 gallon Prairie Farms 2% Milk, at a shelf price of $3.39; two 46 oz. Libby's Pineapple Juice, no shelf price observed. *Testimony of Ms. Rose*; *Exhibit 1*.

7. The prices listed for the products were the shelf price of the products. When Ms. Rose checked out, owner Yousef Ali was the cashier. Mr. Ali had Ms. Rose sign the voucher without entering the "pay exactly" amount. Ms. Rose observed Mr. Ali adding the total, charging $3.79 for both gallons of milk and $2.69 for the juice. He then entered the pay exactly amount of $12.96. *Testimony of Ms. Rose*; *Exhibit 1*.

8. When this transaction was reviewed by the WIC program, it was determined that the total calculated shelf price was $12.26, as opposed to $12.96. *Testimony of Ms. Boyles*; *Exhibit 2*.

9. On January 16, 2002, Ms. Rose entered Neighborhood for a second compliance buy. Using WIC voucher instrument number 0144625, Ms. Rose purchased

the following: 1 gallon of Prairie Farms Vitamin D Milk at shelf price of $3.79; 1 gallon of Prairie Farms 2% Milk at a shelf price of $3.69; one 12 oz. Orchard Gold Apple Juice with no shelf price observable; and one 12 oz. Minute Maid Premium Orange Juice with extra Vitamins G and E, and Zinc, with no shelf price observable. Again, Mr. Ali was the clerk, and he asked Ms. Rose to sign the voucher before the pay exactly amount was entered. Ms. Rose did not see a pay exactly amount entered. *Testimony of Ms. Rose*; *Exhibit 1*.

10. When the WIC program reviewed this buy, the pay exactly amount was entered in the correct sum of $11.46, indicating no violation in shelf price charges, but the voucher did reveal the purchase of an unauthorized food item (orange juice) and the failure to enter the pay exactly amount. *Testimony of Ms. Boyles*; *Exhibit 2*.

11. On January 22, 2002, Ms. Rose returned, using WIC voucher instrument number 0144621 to purchase the following: 1 gallon Prairie Farms Vitamin D Milk at a shelf price of $3.79; 1 gallon of Prairie Farms 2% Milk at a shelf price of. $3.69; one 12 oz. Orchard Gold Apple Juice, no price listed; one 12 oz. Minute Maid Orange Tangerine Juice with Calcium, no price listed; one

24 oz. Kellogg's Corn Flakes at a shelf price of $4.29; one 12 oz. General Milis Corn Chex at a shelf price of $3.99; and 1 dozen Rose Acre Farm Grade A Jumbo Eggs, with no shelf price observed. Again, Mr. Ali was the clerk and he failed to enter the pay exactly amount at the time of purchase. *Testimony of Ms. Rose*; *Exhibit 1*.

12. When the WIC Program reviewed this buy, it calculated the pay exactly amount, using shelf and list prices, at $20.73. The voucher was redeemed by Neighborhood for $24.12. *Testimony of Ms. Boyles*; *Exhibit 2*.

13. On April 23, 2002, the Cabinet notified the Vendor by letter of the alleged violations and imposed a 3-year disqualification from the WIC Program for two (2) of three (3) positive compliance buys while exhibiting a pattern of low variance in at least two out of four quarters in the prior federal fiscal year. This written notification charged the Vendor with violations about which Neighborhood had previously been specifically warned, in writing, by the Cabinet's "low variance" letter of December 21, 2001. *Exhibit 3*.

14. Prior to the compliance buys, on or about December 21, 2001, the Cabinet notified Neighborhood that it had a pattern of low variance in 3 of the last 4 federal

fiscal year quarters. The letter indicated that such a pattern could lead to a disqualification from the program if combined with 2 of 3 positive compliance buys. The letter also stated that low variance "may not indicate that there is anything wrong" with the store's redemption patterns. The letter reports that the Cabinet considers variance to be low if the ratio is 0.3000 or below.

15. The Cabinet's notification of a low variance pattern by its December 21, 2001 letter stated that Neighborhood's variance ratios were as follows:

1st Quarter Oct.-Dec., 2000	2nd Quarter Jan.-March, 2001
0.0038	N/A
3rd Quarter April-June, 2001	4th Quarter July-Sept., 2001
0.0256	0.0847

Exhibit 4; *Testimony or Ms. Boyles.*

16. Ms. Boyles testified that low variance was one factor which went into determining the identification of "high risk" vendors, as federal regulations require state programs to assess. The Cabinet explained that low variance occurs when a store's redemption of similar

food-program vouchers is showing at or close to the same amount. High risk vendors are more likely to have fraudulent submissions. *Testimony of Ms. Boyles.*

17. Neighborhood's owner acknowledged receipt of the Cabinet's notice letter of December 21, 2001 about low variance. Salwa Ali testified that she read the letter, read it to her husband and discussed it with her college-educated daughter. Mrs. Ali further testified that she understood the letter and its warning about the potential jeopardy of a mandated, three-year disqualification "if overcharge violations are found in two of three compliance buys" when low variance had been determined. Mrs. Ali further stated that her daughter explained to her what low variance is: "it means like if somebody (the vendor) is doing their WICs about all the same"; and she testified further "I understood what was going on". That is why, she testified, she did not need to call the WIC Program with questions regarding low variance, as encouraged in the low variance letter of December 21, 2001. *Testimony of Mrs. Ali.*

18. Under the terms of the WIC vendor contract, the Vendor, its local Jefferson County Health Department and the Cabinet agree there shall" be no differentiation

between intentional and unintentional overcharges when determining sanctions. *Cabinet Exhibit 7*; *Testimony of Ms. Boyles*.

CONCLUSIONS OF LAW

1. The Cabinet is authorized by Kentucky Revised Statute ("KRS") 194A.050(1) to adopt, administer and enforce rules and regulations that are necessary to implement programs mandated by federal law or to qualify for the receipt of federal funds. The Cabinet is also responsible for establishing and executing programs relating to matters of public health and nutrition, including the protection and improvement of the health of expectant mothers, infants, preschool and school age children. KRS 211.180(1)(e) and (g). The WIC Program is administered by the Cabinet in accord with these statutory provisions and pursuant to the "Child Nutrition Act of 1966", 42 U.S.C. Section 1786 and 7 C.F.R. Part 246, which authorize grants to the state program. Federal directives mandate policies be adopted at the state level to regulate WIC Programs; the applicable regulations are set forth in 902 KAR 4:040.

2. The Cabinet is responsible for monitoring vendors to ensure compliance with vendor agreements 7 C.F.R. § 246.12(f), and state and federal WIC Program

statutes and regulations. 7 C.F.R. § 246.12(i). In accordance with the federal regulation, the Cabinet has established policies that determine the type and level of sanctions to be applied against food vendors. 7 C.F.R. § 246.12(k). The state regulations concerning vendor violations and mandatory sanctions are set forth in 902 KAR 4:040, Section 12. Administrative regulations are presumed to be valid until declared otherwise by a court. *KRS 13A.140(1)*.

3. WIC vendors must comply with the written contract of Agreement and applicable regulations and statutes at all times; and vendors, as agreed in said contract, are subject to undercover compliance buys at any time.

4. The Cabinet has the burden to show the existence of the violations and the "propriety of a penalty imposed or the removal of a benefit previously granted". The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. *KRS 138.090(7)*.

5. A participating vendor may be disqualified from the WIC Program for violating Program requirements. Disqualification periods range from three months to three years based on the nature and severity of the violation and

whether it is a first, second, or third offense. *902 KAR 4:040, Section 12.*

6. 902 KAR 4:040(1)(16) defines "shelf price" as "...the price displayed on the vendor's display case, on the shelf, or on the food item". The Agreement states that the shelf price is the current market price.

7. 902 KAR 4:040, Section 12(1)(i)(2)(a) states that:

> Two (2) positive compliance buys out of three shall result in a 3-year disqualification if: ...
>
> (ii) The vendor has exhibited a pattern of two out of four quarters of low variance in the prior federal fiscal year.

8. The undersigned concludes that the Vendor did charge more for supplemental food than the current shelf price on January 10, 2002, and January 22, 2002. Whether or not the overcharge was made with intent to defraud is not relevant to this proceeding. The Cabinet has met its burden to prove violations of this provision on two of three compliance buys.

10. Low variance is defined as "the redemption of the same type of food instruments at the same price or

within a narrow price range". *902 KAR 4:040, Section* 1(11).

11. The Cabinet has also met its burden to prove that the sanction imposed is in accordance with 902 KAR 4:040, Section 12, inasmuch as low variance by the vendor has been exhibited and admitted in three of the four quarters during the prior federal fiscal year and the sanctions imposed, a 3-year disqualification, is mandated therefor.

12. As set forth in the Cabinet's Exception No. 1, the appropriate issues to be addressed at the hearing were contained in the Hearing Officer's Notice of Scheduled Hearing dated May 6, 2002. These issues, whether Appellant violated 902 KAR 4:040, Section 12(1)(i)(b) and whether the sanction imposed is in accordance with 902 KAR 4:040, Section 12, were effectively disposed of by stipulation to the Cabinet's allegations, testimony and exhibits in evidence.

13. As set forth in the Cabinet's Exception No. 2, the Hearing Officer concludes that the Cabinet met its burden not only to prove the alleged violation but also to prove that 902 KAR 4:040, Section 12(1)(i)(2)(a) mandates the sanction (a 3-year disqualification) handed down.

14. The Hearing Officer's conclusion that *due process of law* requires that the Cabinet must include in its regulation more definition, detail and explanation of the concept "low variance", and the specifics of the calculations by mathematical formulae for determining whether a vendor meets the threshold ratio to exhibit "low variance", is incorrect.

15. Neighborhood, through the testimony of Ms. Ali, testified that she received the Cabinet's low variance letter, read it and understood it. She also testified that she understood the warning contained therein and that, should Neighborhood commit two violations out of three compliance buys because it had exhibited low variance in three out of four quarters during the prior federal fiscal year, a mandatory sanction of a three-year disqualification must be imposed against the store. Appellant's due process rights were most adequately protected.

16. There are constitutional reasons why the makeup and strategy compromising the "High Risk" category should not be disclosed to vendors. I concur with the Federal Register comment to 7 C.F.R. Section 246.12(j)(3) about not including the high risk criteria in the regulatory language "because doing so would compromise

State agency investigative techniques". This comment from the "Federal Register/Vol. 65, No. 251/Friday, December 29, 2000/Rules and Regulations", page 83266, reads as follows:

> c. Identifying High-Risk Vendors (§ 246.12(j)(3))
>
> Of the forty-one commenters who addressed proposed, § 246.12(j)(2), which covers the requirements for the identification of high risk vendors, thirty opposed it because, we did not include our high-risk criteria in the regulatory language or discuss the specifics of these criteria in the preamble. We believe that these criteria should not be included in the regulatory language because doing so would compromise State agency investigative techniques. Unscrupulous vendors may use this information to avoid being identified as high-risk vendors subject to compliance investigations. Although some stores post signs warning their customers that shoplifters will be subject to criminal prosecution, no stores post signs that specifically disclose the techniques they use to identify potential shoplifters. Most vendors, like most shoppers, are honest and have no reason to be concerned about, investigative techniques.

I conclude that this is a legitimate and constitutional position for the Cabinet to take.

17. No number of "low variance" determinations, even four within four quarters of the prior federal fiscal year, would trigger a compliance investigation. A vendor must commit violations during a compliance buy investigation to bring about the sanctions imposed in this case. Low variance is not a violation.

18. I conclude that the Appellant received a fair, hearing with, all its constitutional rights well-protected by the Cabinet and the Department for Public Health throughout these entire proceedings, during all steps leading up to and, including the administrative hearing August 26, 2002 and that adequate, timely notice was requested and received.

19. I conclude as a matter of law that this case is governed by: Hagan v. Farris, Ky., 807 S.W. 2d 488 (1991); American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W. 2d 450, 453 (1964); and Commonwealth v. Kanter, Ky. App., 898 S.W. 2d 508, 513 (1995). These cases, in addition the federal and Kentucky statutes

regulations and comment cited herein are authority for my Final Order in this case.

FINAL ORDER

WHEREFORE, the decision of the Cabinet to issue a three-year disqualification is AFFIRMED. This is a final and appealable order.

Pursuant to KRS 13B.140, a party may institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service.

Issued this 26th day of December, 2002.

/s/ Marcia R. Morgan
MARCIA R. MORGAN
Secretary, Cabinet for Health Services

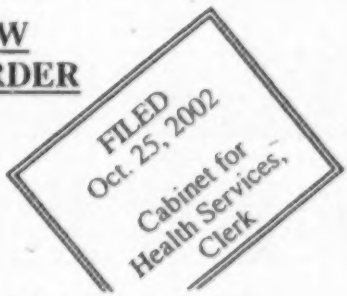
Distribution:
Mailed this the 26th day of December, 2002, by Certified Mail (return receipt requested) or messenger mail by the Administrative Hearings Branch to the following:

Hon. Thomas Cannon
Dr. Rice Leach
Hon. Graddy W. Johnson
Ruthanne Boyles

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH SERVICES
Administrative Hearings Branch
Case No. AHB DMS 02-226

IN RE: NEIGHBORHOOD FOOD MART
Appeal of WIC Program Sanctions

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER



* * * * * * * * * * *

INTRODUCTION

Neighborhood Food Mart ("Neighborhood" or "Vendor") is an approved vendor participating in Kentucky's Special Supplemental Nutrition Program for Women, Infants and Children ("WIC Program"). The WIC Program, which is designed to provide food to pregnant, breast-feeding and postpartum women, as well as infants and children, is administered by the Cabinet for Health Services, Department for Public Health ("the Cabinet"). Neighborhood timely requested an administrative hearing after the Cabinet notified it of a three-year disqualification from participation in the WIC Program for charging more than the current retail market price for WIC food items

during compliance purchases and for having a pattern of "low variance", in violation of 902 KAR 4:040, Section 12(1)(i)(2).

A hearing was conducted in this matter on August 26, 2002, in accordance with 902 KAR 4:040(15) and KRS Chapter 13B. Pursuant to the above-referenced regulation, the undersigned was appointed to preside over the hearing and to render a recommended decision to the Secretary of the Cabinet for Health Services on the validity of the violations and sanctions imposed. The hearing was mechanically recorded by the undersigned.

The Cabinet was represented by the Hon. Graddy Johnson, who called as witnesses the following Cabinet employees: Rebecca Rose, Investigator, Office of the Inspector General and Ruthanne Boyles, Supervisor, WIC Vendor Management Unit. Hon. Thomas Cannon represented the Vendor and presented Salwa Ali, Yousef Ali, and their daughter, Amany Ali, as witnesses.

Based upon the evidence and testimony presented at the hearing and the relevant statutory and regulatory provisions governing the WIC Program, the undersigned hereby makes the following Findings of Fact, Conclusions of Law, and Recommended Decision:

FINDINGS OF FACT

At the hearing, the parties agreed to stipulate to the violations as alleged by the Cabinet. Therefore, the facts in this matter are not in dispute, and are presented herein as uncontested.

1. The Kentucky WIC program is a federally funded program administered by the state, that provides an allotment of specified nutritional items for women, infants and children. This allotment is redeemable by presenting WIC vouchers or checks to a participating vendor. To be a WIC vendor, a retail or wholesale grocery store must enter into a Kentucky WIC Program Vendor Agreement ("Agreement"). The vendors are reimbursed for the cost of the food items through a centralized WIC bank account. Agreements are renewed on an annual basis if a vendor continues to meet WIC Program criteria. Typically, the Cabinet contracts with stores through local health departments. *Testimony of Ruthanne Boyles.*

2. Neighborhood renewed its Vender Agreement with the Jefferson County Health Department on December 1, 2001. Salwa Ali, a co-owner of Neighborhood, signed the Agreement on behalf of the Vendor. The Agreement includes Attachments A through

D. Paragraph 1(a) of the Agreement obligates the vendor to comply with applicable Federal and State policies, procedures, and regulations relating to the WIC Program. WIC vendors and their employees are charged with the knowledge of all policies and procedures of the WIC Program. WIC vendors are accountable for the actions of their employees in the utilization of food instruments or in the provision of supplemental foods. Ms. Ali was the only person at Neighborhood to receive WIC training *Testimony of Ms. Boyles*; *Cabinet Exhibit 7.*

3. Pursuant to the Agreement, Neighborhood agrees to charge "the First Party (WIC Program) the current retail market price or less. In no event shall food costs charged exceed the shelf price of the food provided. The shelf price is considered the current retail market price". *Cabinet Exhibit 7.* "Shelf price" is defined in 902 KAR 4:040, Section 1(16) as the "price displayed on the vendor's display case, on the shelf, or on the food item". According to Ms. Boyles, the shelf price is the price that should always be charged to the WIC Program. *Testimony of Ms. Boyles.*

4. During January, 2002, Yousef and Salwa Ali were the owners of Neighborhood, located in Louisville,

Kentucky, and participating in the WIC program as Vendor # 156801. *Testimony of Ms. Boyles.*

5. Federal regulations mandate that all authorized WIC vendors be monitored at least once every two years. In addition to monitoring vendors, the Cabinet has the ability to conduct "compliance buys", a series of three compliance purchases. The Cabinet contracts with the Office of the Inspecter General to conduct compliance buys. A compliance buy is an undercover investigation where an investigator pretends to be a WIC participant and makes a purchase using a WIC voucher. The investigator then completes a written report that is submitted to the WIC Vendor Management Unit. After the voucher has cleared the bank, the WIC Vendor Management Unit compares the written report and the voucher to determine whether any WIC Program violations occurred during the compliance buy. *Testimony of Ms. Boyles*; *Testimony of Ms. Rose.*

6. On January 10, 2002, Cabinet Investigator Rebecca Rose conducted the first compliance buy at Neighborhood. Ms. Rose, posing as a WIC participant, purchased food items using WIC instrument number 0144615. With that instrument, Ms. Rose purchased the following: 1 gallon Prairie Farms Vitamin D Milk, at a

shelf price of $3.49; 1 gallon Prairie Farms 2% Milk, at a shelf price of $3.39; two 46 oz. Libby's Pineapple Juice, no shelf price observed. *Testimony of Ms. Rose*; *Exhibit 1*.

7. The prices listed for the products were the shelf price of the products. When Ms. Rose checked out, Yousef Ali was the cashier. Mr. Ali then had Ms. Rose sign the voucher without entering the "pay exactly" amount. Ms. Rose then observed Mr. Ali adding the total, charging $3.79 for both gallons of milk and $2.69 for the juice. He then entered the pay exactly amount of $12.96. *Testimony of Ms. Rose*; *Exhibit 1*.

8. When this was reviewed by the WIC program, it was determined that the total calculated shelf price was $12.26, as opposed to $12.96. *Testimony of Ms. Boyles*; *Exhibit 2*.

9. On January 16, 2002, Ms. Rose entered Neighborhood for a second compliance buy. Using instrument number 0144625, Ms. Rose purchased: 1 gallon of Prairie Farms Vitamin D Milk at a shelf price of $3.79; 1 gallon of Prairie Farms 2% Milk at a shelf price of $3.69; one 12 oz. Orchard Gold Apple Juice with no shelf price observable; and one 12 oz. Minute Maid Premium Orange Juice with extra Vitamins C and E, and Zinc, with no shelf

price observable. Again, Mr. Ali was the clerk, and asked Ms. Rose to sign the voucher before the pay exactly amount was entered. Ms. Rose did not see a pay exactly amount entered. *Testimony of Ms. Rose*; *Exhibit 1*.

10. When the WIC Program reviewed this buy, the pay exactly amount was entered as $11.46, indicating no violation in shelf price charges, but did include the purchase of a unauthorized food item (the orange juice) and the failure to enter the pay exactly amount. *Testimony of Ms. Boyles*; *Exhibit 2*.

11. On January 22, 2002, Ms. Rose returned, using instrument number 0144621 to purchase 1 gallon Prairie Farms Vitamin D Milk at a shelf price of $3.79; 1 gallon of Prairie Farms 2% Milk at a shelf price of $3.69; one 12 oz. Orchard Gold Apple Juice, no price listed; one 12 oz. Minute Maid Orange Tangerine Juice with Calcium, no price listed; one 24 oz. Kellogg's Corn Flakes at a shelf price of $4.29; one 12 oz. General Mills Corn Chex at a shelf price of $3.99; and 1 dozen Rose Acre Farm Grade A Jumbo Eggs, with no shelf price observed. Again, Mr. Ali was the clerk and failed to enter the pay exactly amount at the time of purchase. *Testimony of Ms. Rose*; *Exhibit 1*.

12. When the WIC Program reviewed the buy, it calculated the pay exactly amount, using shelf and list prices, at $20.73. The voucher was redeemed for $24.12. *Testimony of Ms. Boyles*; *Exhibit 2*.

13. On April 23, 2002, the Cabinet notified the Vendor of the alleged violations, and imposed a 3-year disqualification from the WIC Program for 2 of 3 positive compliance buys and a written warning for failing to correctly enter the pay exactly amount. *Exhibit 3*.

14. Normally, Ms. Salwa Ali is the clerk at the store. Mr. Yousef Ali is the butcher. Mr. Ali has a limited education and cannot read English. At the hearing, it was testified that Ms. Ali was not at the store during this time due to a very serious family medical emergency. Mr. Ali has not received any WIC training. *Testimony of Ms. Ali*.

15. The Alis' testified that the overcharges were not intentional and occurred as a result of Mr. Ali's confusion. *Testimony of Ms. Ali*; *Testimony of Mr. Ali*.

16. Prior to the compliance buys, on or about December 21, 2002, the Cabinet notified Neighborhood that it had a pattern of low variance in 3 of the last 4 federal year quarters. The letter indicated that such a pattern could lead to a disqualification from the program if combined

with 2 of 3 positive compliance buys. The letter also states that the low variance "may not indicate that there is anything wrong" with the store's redemption patterns. The letter reports that the Cabinet considers variance to be low if the ratio is 0.30 or below. It is not explained what the ratio is comprised of, or how it is calculated. It also does not contain a reference to a regulation containing the variance calculation. *Exhibit 4.*

17. Neighborhood's variance ratios were reported as follows:

1st Quarter Oct.-Dec., 2000	2nd Quarter Jan.-March, 2001
0.0038	N/A[1]
3rd Quarter April-June, 2001	**4th Quarter July-Sept., 2001**
0.0256	0.0847

Exhibit 4; *Testimony of Ms. Boyles.*

18. Ms. Boyles testified that low variance was one method of identifying "high risk" vendors, as federal

[1] The ratio was not reported for this quarter, without explanation. It is assumed that the ratio was above 0.30.

regulations require state program to do. High risk vendors are more likely to have fraudulent submissions. The Cabinet's witnesses did not explain how the 0.30 ratio was determined or what exactly the ratio was comprised of, saying only that low variance occurs when a stores redemption patterns of similar vouchers are close to the same amount. *Testimony of Ms. Boyles.*

19. Low variance can be explained not as fraud, but as occurring in small stores that do not have a wide variety of foods and prices. *Testimony of Ms. Boyles*; *Exhibit 4.*

20. The trigger level of variance violations, 0.30, is not contained in the Cabinet's regulation. *See 902 KAR 4:040.*

21. Under the terms of the WIC vendor agreement, the Cabinet does not differentiate between intentional and unintentional overcharges when determining sanctions. *Cabinet Exhibit 7*; *Testimony of Ms. Boyles*. The undersigned does find, however, that the overcharges were an unintentional incident stemming from confusion by Mr. Ali, and not an attempt to intentionally defraud the WIC program.

CONCLUSIONS OF LAW

1. The Cabinet is authorized by KRS 194.050, Section 1 to adopt, administer and enforce rules and regulations that are necessary to implement programs mandated by federal law or to qualify for the receipt of federal funds. The Cabinet is also responsible for establishing and executing programs relating to matters of public health and nutrition, including the protection and improvement of the health of expectant mothers, infants, preschool and school age children. KRS 211.180, Section 1(e) and (g). The WIC Program is administered by the Cabinet in accord with these statutory provisions and pursuant to the "Child Nutrition Act of 1966", 42 U.S.C. Section 1786 and 7 C.F.R. Part 246, which authorize grants to the state program. Federal directives mandate policies be adopted at the state level to regulate WIC Programs; the applicable regulations are set forth in 902 KAR 4:040.

2. The Cabinet is responsible for monitoring vendors to ensure compliance with vendor agreements (7 C.F.R. 246.12(f) (xi-xiii)), and state and federal WIC Program statutes and regulations. 7 C.F.R. 246.12(i). In accordance with the federal regulation, the Cabinet has established policies that determine the type and level of

sanctions to be applied against food vendors. 7 C.F.R. 246.12(k). The state regulations concerning vendor violations and mandatory sanctions are set forth in 902 KAR 4:040, Section 12. Administrative regulations are presumed to be valid until declared otherwise by a court. *KRS 13A.140(1)*.

3. WIC vendors must comply with the Agreement and applicable regulations and statutes at all times, and are subject to undercover compliance buys at any time.

4. The Cabinet has the burden to show the existence of the violations and the "propriety of a penalty imposed or the removal of a benefit previously granted". The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. *KRS 13B.090(7)*.

5. A participating vendor may be disqualified from the WIC Program for violating Program requirements. Disqualification periods range from three months to three years based on the nature and severity of the violation and whether it is a first, second, or third offense. *902 KAR 4:040, Section 12.*

6. 902 KAR 4:040(1)(16) defines "shelf price" as "...the price displayed on the vendor's display case, on the shelf, or on the food item". (Emphasis added.) The Agreement states that the shelf price is the current market price.

7. 902 KAR 4:040, Section 12(1)(i)(2)(a) states that:

> Two (2) positive compliance buys out of three shall result in a 3-year.disqualification if:...
>
> (ii) The vendor has exhibited a pattern of two out of four quarters of low variance in the prior federal fiscal year.

8. The undersigned concludes that Mr. Ali did charge more for supplemental food than the current shelf price on January 10, 2002, and January 22, 2002. Whether or not it was done with any intent to defraud is not relevant to this proceeding. In this matter, the Cabinet has met its burden to prove violations of this provision on two of three compliance buys.

9. To establish this violation, the Cabinet must show 2 of 3 positive compliance buys and low variance for 2 of 4 federal quarters.

10. Low variance is defined as "the redemption of the same type of food instruments at the same price or within a narrow price range". 902 KAR 4:040, Section 1(11).

11. Since low variance is an element or a condition precedent to the violations leading to the sanction applied in this case, the Cabinet must meet its burden of proof to establish that the vendor had low variance, and that such condition violates the regulation. The Cabinet failed to meet that burden.

12. As Counsel for the Cabinet ably points out, the undersigned cannot declare a regulation to be invalid. No attempt is being made to do so in this opinion. An administrative tribunal may, however, determine whether the Cabinet has met its burden to establish violation of the regulation. In this matter, the Cabinet did establish what the variance level was for this Vendor. But the Cabinet must also show that such a level violates a validly promulgated regulation. The Cabinet testified that the variance level threshold that constitutes low variance is 0.30 or below. While this testimony shows the considered by the Cabinet to constitute low variance, it does not show that the levels were in violation of a regulation. Simply because the

Cabinet considers a ratio below 0.30 to be low variance, that does not make it so, absent a valid regulation. At best, the Cabinet can prove that Neighborhood's variance levels violated an internal policy on acceptable variance levels. As a matter of law, internal policy cannot be enforced as a regulation. *KRS 13A.130.* In short, the Cabinet did not show that Neighborhood's variance ratios of 0.0038 (1st Quarter), 0.0256 (3rd Quarter), and 0.0847 (4th Quarter) violate any provision contained in the regulation. Absent such proof, the violation of 902 KAR 4:040, Section 12(1)(i) cannot be sustained.

13. Due process must be afforded at any level of legal proceeding whether in Circuit Court, Appeals Court, or the administrative process. At the heart of due process is the requirement that the regulated public be made aware of what actions place them in danger of being sanctioned. In this matter, the Cabinet's regulation does not alert the public as to what level of variance is a violation, even though its letters may. No amount of constructive notice; i.e., letters and seminars, can overcome the constitutionally protected right of due process via regulatory notification of the standards of the law. This is compounded by the Cabinet's statement on its low variance letter that this "may

not indicate that anything is wrong". While this decision is not based on a finding of a KRS Chapter 13A violation, the Cabinet would be wise to consider both the implication of this ruling, and how a reviewing court would look at this matter.

14. Based on the failure to establish that Neighborhood's variance levels violate a provision of the regulation, the undersigned must conclude as a matter of law that the Cabinet has not carried its burden to establish the violations, and this matter must be reversed.

RECOMMENDED DECISION

For the foregoing reasons, it is recommended that the Cabinet's finding that Neighborhood Food Mart violated the 902 KAR 4:040, Section 1(11), and should receive a three-year disqualification from the WIC Program, be **REVERSED**. The written warning was not contested and is **AFFIRMED**.

Pursuant to KRS 13B.110(4), the parties shall have fifteen days from the date of this Recommended Order in which to file exceptions with Marcia R. Morgan, Secretary, Cabinet for Health Services, c/o Administrative Hearings Branch, 1-E, Health Services Building, 275 E. Main Street, Frankfort, Kentucky, 40621.

So recommended this 25th day of October, 2002.

/s/ David B. Wicker
DAVID B. WICKER
Hearing Officer
Administrative Hearings Branch
Cabinet for Health Services
275 East Main Street
Health Services Building, 1-East
Frankfort, Kentucky 40621
(502) 564-6621

Distribution:

Hon. Graddy Johnson, Messenger Mail
Hon. Thomas Cannon, Certified Mail
Ruthanne Boyles, Messenger Mail
Dr. Rice Leach, Messenger Mail